Supreme Court, U.S.
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No. 94-441

In the Supreme Court of the United States

OCTOBER TERM, 1994

BILLIE BRYAN MACKEY, PETITIONER

v.

CLIFFORD MOSS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in summarily affirming the district court's refusal to transfer petitioner's due process claims under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), where the court of appeals in a prior appeal had refused to transfer the same claims, and no review of that order was sought in this Court.

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OPINIONS BELOW

The order of the court of appeals granting summary affirmance (Pet. App. 1a), and the opinion of the district court (Pet. App. 4a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1994. A petition for rehearing was denied on June 15, 1994. Pet. App. 2a. The petition for a writ of certiorari was filed on September 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, Billie Bryan Mackey, was employed at the National Institutes of Health (NIH). Her petition arises out of litigation in which she raised three interrelated sets of claims: (1) Title VII claims of sex discrimination and retaliation; (2) Administrative Procedure Act claims of arbitrary refusal to process grievances relating to the appointment of and assignment of duties to another employee in the job she sought; and (3) *Bivens* due process claims alleging deprivation of liberty and property interests relating to employment. Only the *Bivens* claims are at issue in the petition.

1. In 1980, petitioner was selected to serve as Director of the National Digestive Diseases Education and Information Clearinghouse (the Clearinghouse) of the NIH's National Institute of Arthritis, Diabetes and Digestive and Kidney Diseases (NIADDK). Respondent Dr. Harold Roth acted as petitioner's supervisor, and respondent Earl Lawrence had certain supervisory responsibility over Roth. In 1984, respondent Dr. Ralph Bain, who had been employed at NIADDK as a temporary consultant, was appointed to the permanent civil service position of Executive Director of the Clearinghouse. Pet. App. 5a-6a.

Petitioner contends that Bain's appointment violated civil service laws requiring a competitive application process. Pet. 4-7. As Executive Director, Bain acted as petitioner's direct supervisor. Pet. App. 6a. Petitioner asserts that some of her duties were reassigned to Bain, who was "clearly less qualified" than she to perform those duties, Pet. 5, and that she was later transferred to a lower grade position. Pet. 6.

Beginning in June, 1984, petitioner filed ten administrative complaints, alleging that the personnel actions

of her supervisors were unlawful. She also filed an administrative charge of employment discrimination. The EEOC hearing showed that respondents failed in some respects to comply with civil service laws in the permanent appointment of Bain. 8/4/89 Tr. 359. In 1989, after the hearing, the EEOC administrative judge recommended finding that there was no discrimination. The agency adopted that recommendation.

Petitioner asserts that respondents' actions deprived her of a due process "right to a[] thorough and impartial investigation and fair and prompt hearing" of her discrimination claims. Pet. 6; see Pet. 7-8. In view of the EEOC administrative evidentiary hearing, including the airing of the civil service irregularities, the precise nature of the asserted due process violation is unclear.

2. In 1990, petitioner filed a civil action in the United States District Court for the District of Columbia. Petitioner's complaint asserted claims against the agency under Title VII, 42 U.S.C. 2000e-16; claims against the agency under the Administrative Procedure Act, 5 U.S.C. 706; and *Bivens* claims against respondents in their individual capacities. See *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). She sought backpay and compensatory and punitive damages. Pet. App. 6a-7a.

Respondents moved to transfer the Title VII claims to the District of Maryland. The district court granted the motion, holding that venue in the District of Columbia was improper under the special Title VII venue provision, 42 U.S.C. 2000e-5(f)(3). Under that provision, venue is proper where the allegedly unlawful conduct took place, where the employment records are maintained, or where the position at issue was located. Maryland is the only proper venue under those tests. Pet. App. 7a-8a.

The district court granted the respondents' motion to dismiss the remaining claims. The court dismissed the APA claim because it restated the cause of action set out in the Title VII claim. The court held that "there is no separate cause of action under the APA or otherwise to challenge the handling of an EEO complaint." Pet. App. 9a.

The court dismissed the *Bivens* claims with prejudice on three independent grounds, concluding that "[a]ny one basis would serve as an adequate basis for dismissal." Pet. App. 9a. First, the court held that there was no personal jurisdiction over the individual defendants in the District of Columbia. *Id.* at 10a-11a. Second, the court found that the complaint failed "to allege the deprivation of any clearly established constitutional or statutory right" that would support a *Bivens* action. Pet. App. 12a. Third, the court ruled that, under *Bush* v. *Lucas*, 462 U.S. 367 (1983), the *Bivens* claims were precluded by the comprehensive remedial scheme established by Congress in the Civil Service Reform Act. Pet. App. 12a-13a.

3. Petitioner appealed the district court's ruling to the District of Columbia Circuit. The court of appeals summarily affirmed in an unpublished, two-page *per curiam* order. The court stated that "[b]ecause all relevant actions occurred in Maryland and the relevant parties worked and resided in Maryland, the district court was without jurisdiction to entertain the appellants' claims." Pet. App. 17a. The merits of the parties' positions were "so clear as to warrant summary action." *Ibid.* The court also affirmed the transfer of the Title VII claims to Maryland. *Id.* at 18a.

Petitioner filed a "Petition for Rehearing and Request for Entry of Transfer Order," seeking, among other things, an order directing the district court to transfer

the *Bivens* claims to the District of Maryland. The court denied the petition. Pet. App. 19a.

4. Petitioner then moved in the district court to transfer the *Bivens* claims to the District of Maryland. The court denied the motion, explaining that "this [c]ourt has already dismissed these same claims with prejudice." Pet. App. 4a. The court further held that "transfer would not be in the interests of justice because the claims are not meritorious." *Ibid.*

5. Petitioner again appealed to the District of Columbia Circuit. The court of appeals granted respondents' motion for summary affirmance. In an unpublished one-page order, the court held that it had, in the prior appeal, already rejected petitioner's arguments in favor of the proposed transfer. The court stated that "[t]here are no exceptional circumstances here which would warrant departure from the law of the case." Pet. App. 1a.

Petitioner sought rehearing and rehearing *en banc*. The rehearing petition was denied, Pet. App. 2a, as was the suggestion for rehearing *en banc*. *Id.* at 3a.

ARGUMENT

Petitioner contends that a writ of certiorari is warranted in order to resolve a circuit conflict regarding whether heightened standards of pleading apply to *Bivens* claims where qualified immunity is raised as a defense. Pet. 14-24. Specifically, petitioner challenges the District of Columbia Circuit's "direct evidence" test. Pet. 14.* The heightened pleading and "direct eivdence" issues are not, however, presented in this case.

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* That issue is raised by the pending certiorari petition in *Kimberlin* v. *Quinlan*, No. 93-2068. On October 3, 1994, this Court invited the Solicitor General to submit the views of the United

1. The district court dismissed petitioner's *Bivens* claims with prejudice on three independent grounds, none of which pertains to the circuit conflict asserted in the petition. Because resolution of the conflict thus could not change the disposition of the case, a writ of certiorari would be inappropriate.

a. The district court's holding that it lacked personal jurisdiction over the individual defendants in the District of Columbia was alone an adequate basis for that court's rejection of petitioners *Bivens* claims. Pet. App. 10a-11a. That ruling was summarily affirmed, and is not contested here. The personal jurisdiction ruling supports the judgment on grounds unrelated to the asserted circuit conflict.

b. The district court also held that petitioner's *Bivens* claims were precluded under *Bush* v. *Lucas*, 462 U.S. 367 (1983), in light of the comprehensive remedial scheme established by the Civil Service Reform Act. Pet. App. 12a-13a. In *Bush*, this Court held that because the Civil Service Reform Act includes "comprehensive procedural and substantive provisions" regarding claims arising out of the federal employment relationship and provides "meaningful remedies against the United States, * * * it would be inappropriate for us to supplement that regulatory scheme" with a constitutional *Bivens* action against the individual federal officials. 462 U.S. at 368, 390. See also *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988) (reaffirming *Bush*). That holding, too, is dispositive, and petitioner does not contest it here.

c. The district court, under the heading "Failure to Meet Heightened Pleading Standard," held in the

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States regarding the issue presented in that petition, and the Solicitor General is in the process of preparing a response.

alternative that the complaint failed to state a *Bivens* claim. Although the heading refers to a heightened pleading standard, the court actually held that petitioner failed to "allege the deprivation of any clearly established constitutional or statutory right." Pet. App. 11a-12a. The court reasoned:

> The [petitioner] alleges nothing more than ordinary federal personnel actions involving assignments of duties and supervisory responsibilities. There is no indication that the trivial actions complained of by the [petitioner] violated clearly established constitutional rights.

Id. at 12a. The decision thus does not implicate a heightened pleading standard. Rather, the court effectively held, as did this Court in *Siegert* v. *Gilley*, 500 U.S. 226, 227 (1991), that "petitioner's claim failed at an analytically earlier stage of the inquiry into qualified immunity: [her] allegations, even if accepted as true, did not state a claim for violation of any rights secured to [her] under the United States Constitution." Petitioner's *Bivens* claims were not dismissed because they were pleaded with insufficient specificity, but because, at the threshold, she failed to "assert[] a violation of a constitutional right at all." *Id.* at 232.

2. The petition for a writ of certiorari should also be denied because the court of appeals' decision of which review is sought did not address the merits of the district court's initial decision, so the question petitioner raises is not presented. The only issue presented by the court of appeals' decision is whether the court erred in applying the law of the case, as reflected in its prior order, to affirm the district court's decision not to transfer the *Bivens* claims (Pet. App. 1a). That

issue is not raised in the petition, and in any event would not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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